B. ***Whether BCA Financial acted willfully or knowingly is an issue for trial.***

Recall that "[i]f the court finds that the defendant willfully or knowingly violated [the TCPA], the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount[.]" § 227(b)(3). Rather than decide the willfully-or-knowingly issue on summary judgment, several courts have left the issue for trial. *See McCaskill v. Navient Sols., Inc.*, 178 F. Supp. 3d 1281, 1295 (M.D. Fla. 2016); *Manuel*, 200 F. Supp. 3d at 502–03; *Hines v. CMRE Fin. Servs., Inc.*, No. 13-61616-CIV, 2014 WL 105224, at *5 (S.D. Fla. Jan. 10, 2014), *amended in other respects*, 2014 WL 11696706 (S.D. Fla. Jan. 23, 2014). The Court follows that approach here.

At this point, the evidence does not unequivocally show that BCA willfully or knowingly violated the TCPA as a matter of law. If anything, the evidence shows the opposite -- that the calls were *unintentional*. The parties agree that BCA Financial did not intend to call Reyes but was trying to reach someone else to collect a debt. [ECF Nos. 86-1, p. 1; 93, p. 6]. BCA Financial obtained Reyes' cellphone number from one of its clients, Barnabas, who associated that number with a former patient (based on what the patient wrote on certain medical forms). [ECF Nos. 86-1, pp. 1–2; 93, pp. 2, 5; 96, pp. 4, 7]. And Barnabas did not inform BCA Financial that the number belonged to someone other than the patient. [ECF Nos. 93, p. 5; 96, p. 7].

It is true that BCA Financial did not ask Barnabas if the number was accurate. [ECF Nos. 86-1, p. 1; 93, p. 5]. But then again, Barnabas did not know that the number

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belonged to someone else. [ECF Nos. 93, p. 5; 96, p. 7]. So a jury may deem BCA Financial's lack of follow-up inconsequential because Barnabas would likely not have told BCA Financial that the phone information was incorrect.

Moreover, the parties agree on the fact that after the sixth call, when Reyes indicated to an IVR message that BCA Financial had dialed the wrong number, BCA Financial stopped calling. [ECF Nos. 93, p. 2; 96, p. 4]. That would indicate that BCA Financial did not intend to call her cellphone once it *knew* that it had the wrong number. To be sure, BCA Financial could have manually called Reyes to verify the number, a step that it did not take because it was contrary to their mode of operation. [ECF Nos. 86-1, p. 3; 93, p. 6]. But that is but another omission for the jury to weigh.

Lastly, the parties agree that BCA Financial at least *tried* to be TCPA compliant: it maintains a TCPA Participant Guide that it makes available to all employees; instructs its representatives on how to notate each account and operate its collection software; and provides compliance training for the TCPA. [ECF Nos. 86-1, pp. 1, 6; 93, pp. 1, 7; 96, p. 4]. A jury might review that evidence and decide that BCA Financial did not knowingly or willingly call an unknown person's cellphone without permission. Or the jury might assess that evidence and conclude that BCA Financial should have known better or that its training and compliance are surely lacking.

In short, based on the record as it stands, the Court **denies** summary judgment in Reyes' favor on the issue of treble damages.

C. *BCA Financial's use of the IVR cannot form a basis for summary judgment because it is an unpled claim.*

"Although the Supreme Court has mandated liberal pleading standards for civil complaints, the standard 'does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage.'" *Newman v. Ormond*, 396 F. App'x 636, 639 (11th Cir. 2010). Thus, as opposed to simply raising additional *facts* in support of an already pled claim, a plaintiff on summary judgment cannot raise "an additional, separate statutory basis" for relief. *Hurlbert v. St. Mary's Health Care Sys.*, Inc., 439 F.3d 1286, 1297 (11th Cir. 2006).

For instance, in *Hurlbert*, the plaintiff had alleged in his complaint that he was entitled to FMLA leave based on *his* illness, but on summary judgment, he alleged that he was entitled to leave to take care of his sick mother. *Id.* The plaintiff argued that the general rule prohibiting him from raising new claims on summary judgment was "inapplicable, because his allegations about his mother do not raise a new 'claim,' and are merely additional facts asserted in support of the interference claim already pled in his complaint." *Id.* The Eleventh Circuit disagreed, explaining that "the subsequent assertion of an additional, separate statutory basis for entitlement to leave" was "a fundamental change in the nature of [the] interference claim." *Id.* Thus, the Court continued, "[h]aving proceeded through discovery without amending (or seeking to amend) his complaint to reflect that fundamental change, [the plaintiff] was not entitled to raise it in the midst of summary judgment." *Id.*

In this case, Reyes' Complaint repeatedly alleged that BCA Financial violated the TCPA by using an *automatic telephone dialing system.* [ECF No. 1, pp. 1, 3–7 ¶¶ 2, 24–25, 33, 37–38, 43, 52]. In the one specific allegation within her TCPA count, she likewise alleged that BCA Financial violated the TCPA "by using an **automatic telephone dialing system** to place non-emergency calls to Plaintiff's cellular telephone number, absent prior express consent." [ECF No. 1, p. 9 ¶ 74 (emphasis added)]. Nowhere does she allege that BCA Financial called her using an artificial or prerecorded voice.

Notably, in its briefing, Reyes could point to just two parts in the Complaint in support of her argument that the Complaint encompasses a claim for the use of an artificial or prerecorded voice. First, she points to her *original* class definition, which broadly includes violations for "using an automatic telephone dialing system *or an artificial or prerecorded voice.*" [ECF No. 1, p. 6 ¶ 44 (emphasis added)]. But Reyes has since *changed* that class definition, removing any reference to artificial or prerecorded voices. [ECF No. 59, p. 1]. So even assuming that the initial, all-encompassing, generic class definition provided sufficient notice of her individual claim -- an implicit assumption that the Court does not accept -- the definition has since changed.

Second, Reyes points to her wherefore clause, which asks for, among other things, that the Court adjudge and declare that BCA Financial violated the TCPA. [ECF No. 1 p. 10]. But that is just a general prayer for relief and not a specific claim. The liberality granted to pleadings does not extend *that* far. If it did, then a plaintiff could

generally include a prayer that a defendant violated a statute and then seek summary judgment on any number of unpled theories and additional facts affording relief.

Moreover, BCA Financial's use of an artificial or prerecorded voice (in the form of an IVR) cannot be deemed to be an additional fact in support of an existing TCPA claim. As Reyes herself recognized, the use of the IVR provides a separate basis for relief with its *own* set of damages. [ECF No. 96, p. 4]. It is thus "an additional, separate statutory basis" for relief. *Hurlbert*, 439 F.3d at 1297.

It is obvious that the discovery in this case changed the factual understandings held by Reyes and BCA Financial. That being the case, however, Reyes should have amended her Complaint to allege the additional basis for statutory relief -- BCA Financial's use of an ATDS *and* its use of an artificial or prerecorded voice. Consequently, "[h]aving proceeded through discovery without amending (or seeking to amend) [her] Complaint to reflect that fundamental change, [Reyes is] not entitled to raise it in the midst of summary judgment." *Id.*

In short, the Court **denies** Reyes' summary judgment motion on the two claims that seek damages for BCA Financial's use of an artificial or prerecorded voice issue.

DONE and ORDERED in Chambers in Miami, Florida, on May 14, 2018.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All counsel of record

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John Herrick,

Plaintiff,

v.

GoDaddy.com LLC,

Defendant.

No. CV-16-00254-PHX-DJH

ORDER

This putative class action arises out of Defendant GoDaddy.com LLC's ("GoDaddy") alleged violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA"), which prohibits the making of any call, including text messages, using an automatic telephone dialing system, to any telephone number assigned to a cellular telephone service, without the called party's consent.

Pending before the Court are three fully briefed motions: (1) Plaintiff John Herrick's ("Plaintiff") Motion to Strike Defendant GoDaddy.com LLC's Fourth Affirmative Defense of Consent as Legally Deficient (Doc. 74); (2) GoDaddy's Motion to Exclude the Expert Report and Opinion of Jeffrey A. Hansen (Doc. 83); and (3) GoDaddy's Motion for Summary Judgment, or in the Alternative, Motion to Stay (Doc. 79).

The Court finds that undisputed material facts show that GoDaddy did not use an automatic telephone dialing system ("ATDS") to send the text in question. As such, Plaintiff cannot establish a claim under the Telephone Consumer Protection Act

("TCPA"). Summary judgment is thus granted in favor of GoDaddy. Because this finding is not predicated on the Federal Communications Commission's ("FCC") "potential capacity" guidance, GoDaddy's request to stay these proceedings is denied. GoDaddy's Motion to Exclude Plaintiff's expert and Plaintiff's Motion to Strike GoDaddy's affirmative defense are denied as moot.

I. BACKGROUND

GoDaddy is a provider of web-based products and services, including domain name registration, website hosting, and other online business applications. (Doc. 79 at 1; First Amended Complaint ("FAC"), Doc. 27 at ¶ 25). In 2015, GoDaddy contracted with a web-based software application company called 3Seventy, Inc. ("3Seventy") to send a one-text marketing campaign to nearly 100,000 of its customers using its 3Seventy Platform. (GoDaddy's Statement of Undisputed Fact ("Def. SOF"), Doc. 80 ¶¶ 1, 2; Plaintiff's Separate Controverting Statement of Undisputed Facts ("Pl. CSOF"), Doc. 91 ¶¶ 1, 2).

To conduct a text campaign using the 3Seventy Platform, a user must provide 3Seventy with a list of customer phone numbers, something GoDaddy did via its file transfer protocol ("FTP") site. (Def. SOF ¶ 7; Pl. CSOF ¶7).[1] 3Seventy then uploads the list of numbers to its 3Seventy Platform. (*Id.*) A user like GoDaddy navigates to the website, manually logs onto 3Seventy's Platform, and determines which numbers it would like to send a text message. (Def. SOF ¶¶ 8, 9; Pl. CSOF ¶¶ 8, 9). The user creates a message by manually typing in the desired content and selecting a time and date that the message will be sent. (Def. SOF ¶¶ 10, 11; Pl. CSOF ¶¶ 10, 11). As a final step, the user must type in what is referred to as a "captcha" – here, twelve alphanumeric values – to approve and authorize sending the message. (Def. SOF ¶ 12; Pl. CSOF ¶ 12). On the date and time specified by the user, the 3Seventy Platform sends the message to a Short Messaging Service ("SMS") gateway aggregator that then transmits the message directly to the cell phone carrier. (Pl. Separate Statement of Additional Supporting Facts

[1] Information as to the operation of the 3Seventy Platform was provided by John Wright, the chief executive officer ("CEO") and corporate representative from 3Seventy.

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("Pl. SSOF ¶ 20). Plaintiff received the offending text on December 15, 2015. (FAC, Doc. 27 ¶ 28). The single text message offered Plaintiff a "promo code" to "save 40% on new products." (*Id.*) Plaintiff alleges that GoDaddy sent the text to him without his consent. (*Id.*)

Plaintiff filed this action on January 28, 2016, asserting a single TCPA violation against GoDaddy. On August 9, 2016, Plaintiff filed an amended complaint. (FAC, Doc. 27). On February 1, 2017, GoDaddy answered the FAC, asserting, among others, the affirmative defense of consent. (Answer, Doc. 68). On March 3, 2017, Plaintiff moved to strike GoDaddy's consent defense as legally deficient. (Doc. 74). Soon thereafter, the parties completed the phased discovery ordered by the Court. (Doc. 38). This limited discovery was ordered in part so that the parties could explore whether the 3Seventy Platform was an ATDS under the TCPA. (*Id.*)

On March 31, 2017, GoDaddy filed for summary judgment on the sole grounds that the 3Seventy Platform is not an ATDS. GoDaddy alternatively asked that, if the Court was inclined to deny summary judgment in reliance on the FCC's "potential capacity" guidance, the Court stay these proceedings pending the Ninth Circuit's decision in *Marks v. Crunch San Diego*, No. 14-56834 (9th Cir. 2016). On March 31, 2017, GoDaddy also moved to exclude the report and opinions of Plaintiff's expert Jeffrey A. Hansen. (Doc. 83). All of the pending motions are opposed and fully briefed.[2]

The Court will first address GoDaddy's motion for summary judgment and the accompanying motion to stay.

II. DISCUSSION

A. Legal Standards for Summary Judgment

Fed. R. Civ. P. 56(a) allows for summary adjudication of a claim or defense when the parties' discovery shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also Celotex Corp. v. Catrett*,

[2] The parties have requested oral argument. The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b) (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

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477 U.S. 317, 323–24 (1986) (a principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims"). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.*; *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts"). In cases where a reasonable juror could find for a nonmoving party, summary judgment is inappropriate. *See Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) ("Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor").

To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). But the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

The Court's function at this stage is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. Thus, while the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor," if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50, 255.

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With these principles in mind, the Court now turns to the parties' arguments.

B. "Automated Telephone Dialing Systems" Under the Telephone Consumer Protection Act

To establish a claim under the TCPA, a plaintiff must show the unauthorized call or text was sent from an "automatic telephone dialing system." The crux of GoDaddy's motion for summary judgment is that the 3Seventy Platform is not an "automatic telephone dialing system" as that term is defined by the TCPA and subsequent FCC regulations, and therefore, Plaintiff's Complaint should be dismissed.

The TCPA was enacted to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (quoting S. Rep. No. 102-178 at 1, 1991 U.S.C.C.A.N. 1968 (1991)). Under the TCPA, it is unlawful "to make any call [or send any text message]...using any **automatic telephone dialing system**...to any...cellular telephone service," without the prior consent of the called party. 47 U.S.C. § 227(b)(1) (emphasis added). *See also In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14155 ¶ 165 (2003) ("2003 FCC Order") (concluding that the statute's restriction on "mak[ing] any call" encompasses the sending of text messages); *Kristensen v. Credit Payment Servs., Inc.*, 879 F.3d 1010, 1013 (9th Cir. 2018).

The TCPA defines an ATDS, or what is often referred to as an autodialer, as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The Ninth Circuit has held that "[w]hen evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Satterfield*, 569 F.3d at 951. As such, "a system need not actually store, produce, or call randomly or sequentially

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generated telephone numbers, it need only have the capacity to do it." *Id.*

Congress has given the FCC authority to issue interpretative rules pertaining to the TCPA. *See e.g.*, 47 U.S.C. § 227(b)(2) (directing the FCC to "prescribe regulations to implement the requirements of this subsection"); *ACA Int'l v. FCC*, 885 F.3d 687, 693 (D.C.C. 2018) ("The TCPA vests the Commission with responsibility to promulgate regulations implementing the Act's requirements"). In 2015, the FCC issued an order authorizing an expansive interpretation of the statutory term "capacity" in determining whether a device is an autodialer under the TCPA. *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.R. 7961 (2015) ("2015 FCC Order"). Specifically, the 2015 FCC Order adopted an interpretation that would allow courts to consider not only a device's present uses or abilities in assessing whether it was an ATDS, but also its "potential functionalities." *Id.* at 7974.

In their briefs, the parties dispute whether the Court should apply the FCC's expansive interpretation of "capacity" in determining whether the 3Seventy Platform is an ATDS.[3] At the time that GoDaddy filed its Motion for Summary Judgment, eleven petitions relating to this broad definition had been consolidated in the D.C. Circuit Court of Appeals,[4] but the opinion had not yet been issued. After consolidation of these

[3] The Federal Communications Act ("FCA") requires that a party challenging the validity of a FCC order do so in a federal court of appeals. 47 U.S.C. § 402(a); 28 U.S.C. § 2342. Given this jurisdictional limitation, an order of the FCC that interprets the TCPA is binding on district courts until and unless a court of appeals decides to set it aside. 28 U.S.C. § 2342(1). *See also Luna v. Shac, LLC*, 122 F. Supp.3d 936, 939 (N.D. Cal. 2015) (noting that the Hobbs Act "jurisdictionally divests district court from ignoring FCC rulings interpreting the TCPA"). *But see e.g., Marks v. Crunch San Diego*, 55 F. Supp.3d 1288, 1291 (S.D. Cal. 2015) (finding that FCC does not have the statutory authority to expand the TCPA's definition of an ATDS because unlike 227(b) and (c), section 227(a) "does not include a provision giving the FCC rulemaking authority"). Unlike the defendant in *Marks*, GoDaddy does not argue that the FCC's interpretations of an ATDS are invalid because they are outside its rulemaking authority. Instead, GoDaddy argues that the Court need not look to the FCC interpretations in light of the Ninth Circuit's pronouncement in *Satterfield* that the statutory definition of an ATDS is "clear and unambiguous." (MSJ, Doc. 79 at 11 (citing 569 F.3d at 951 (finding that where the statutory text is "clear and unambiguous" the court's "inquiry begins with the statutory text, and ends there as well")).

[4] *See Prof'l Assoc. for C v. FCC*, No. 15-1440 (D.C. Cir. Dec. 11, 2015); *Portfolio Recovery Assocs. v. FCC*, No. 15-1314 (D.C. Cir. Sept. 9, 2015); *Rite Aid Corp. v. FCC*, No. 15-1313 (D.C. Cir. Sept. 8, 2015); *Vibes Media, LLC v. FCC*, No. 15-1311 (D.C. Cir. Sept. 8, 2015); *Chamber of Commerce v. FCC*, No. 15-1306 (D.C. Cir. Sept. 3, 2015);

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petitions, the Ninth Circuit *sua sponte* stayed a case dealing with issues related to the definition of an ATDS until the D.C. Circuit court issued its opinion. *See Marks v. Crunch San Diego*, Case No. 14-56834 (9th Cir. Dec. 14, 2016).

On March 16, 2018, before this Court had ruled on the parties' motions, the United States Court of Appeals for the District of Columbia Circuit set aside the FCC's broad definition of "capacity", finding that it constituted an "unreasonably expansive interpretation of the statute." *See ACA Int'l*, 885 F.3d at 692. The court specifically held that the FCC's definition of an ATDS could not be sustained "at least given the Commission's unchallenged assumption that a call made with a device having the capacity to function as an autodialer can violate the statute even if autodialer features are not used to make the call." *Id.* at 695. In so finding, the *ACA Int'l* court did not, however, think that "capacity" necessarily only meant a device's "present ability." *Id.* at 696 (expressing doubt that a definition of "capacity" that only accounted for a devices' "'present ability,' e.g., its current and unmodified state…should carry dispositive weight in assessing the meaning of the statutory term"). Indeed, the court stated that

> even under the ostensibly narrower, 'present ability' interpretation…a device that 'presently' (and generally) operates as a traditional telephone would still be considered [to] have the 'capacity' to function as an ATDS if it could assume the requisite features *merely upon touching a button* on the equipment to switch it into an autodialer mode. Virtually any understanding of 'capacity' thus contemplates some future functioning state, along with some modifying act to bring that state about.

Id. (emphasis added). The inquiry, suggested the *ACA Int'l* court, should therefore focus "less on labels such as 'present' and 'potential' and more on considerations such as **how much** is required to enable the device to function as an autodialer." *Id.* (emphasis added).

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Consumer Bankers Ass'n v. FCC, No. 15-1304 (D.C. Cir. Sept. 3, 2015); *salesforce.com, Inc. v. FCC*, No. 15-1290 (D.C. Cir. Sept. 1, 2015); *Prof'l Ass'n for Customer Engagement, Inc. v. FCC*, No. 15-1244 (D.C. Cir. July 29, 2015); *Sirius XM Radio, Inc. v. FCC*, No. 15-1218 (D.C. Cir. July 14, 2015); and *Professional Association for Customer Engagement, Inc. v. FCC*, No. 15-2489 (7th Cir. July 14, 2015).

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The D.C. Circuit Court of Appeals' decision in *ACA Int'l v. FCC* forecloses Plaintiff's argument that the FCC's expansive interpretation of the term "capacity" in its 2015 Order is binding on this Court.[5] The Court thus declines Plaintiff's invitation to undergo an analysis of whether the 3Seventy Platform had the *potential* capacity to operate as an autodialer in 2015. GoDaddy's request for a stay on these grounds is therefore denied as unnecessary.

However, the Court finds the *ACA Int'l* court's statement on the proper "capacity" inquiry both instructive and in line with Ninth Circuit precedent on the issue. *See Satterfield*, 569 F.3d at 951 (remanding case where district court erroneously limited its analysis to only whether the system *actually* performed the requisite functions and not whether the system had the *capacity* to perform the requisite functions). To the extent the Court finds the undisputed facts support GoDaddy's contention that the 3Seventy Platform lacked the ability to operate as an autodialer at the time the text message was sent, the Court will also investigate whether a dispute of material fact exists as to "how

[5] The precedential effect of *ACA Int'l* has been disputed by many district courts across the country, mostly in the context of determining whether a stay pending the D.C. Circuit Court's decision would be warranted. Courts have reached conflicting decisions on the issue. This Court finds that the decision in *ACA Int'l* is binding on district courts in this circuit. Here, eleven petitions for review of the 2015 FCC Order were consolidated in the D.C. Circuit Court of Appeals – one of which originated in the Seventh Circuit. *See Professional Association for Customer Engagement, Inc. v. FCC*, No. 15-2489 (7th Cir. July 14, 2015). The Ninth Circuit has held that when agency regulations are challenged in more than one federal court of appeals, and subsequently consolidated and assigned to a single circuit court by the Judicial Panel on Multidistrict Litigation, the resulting decision is binding outside of that circuit. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (noting that an Eleventh Circuit decision regarding the validity of an FCC order was "binding outside of the Eleventh Circuit" where the Judicial Panel on Multidistrict Litigation had consolidated challenges from both the Eleventh and Second Circuits). *Accord MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1267 (9th Cir. 2000). *Peck* and *MCI Telecommunications Corp.* both stand for the proposition that "if the D.C. Circuit were to vacate (or uphold) one or more of the challenged FCC interpretations, this court could not instead continue to follow the FCC's now-vacated (or not follow the FCC's now-affirmed) interpretations in resolving Plaintiff's claims." *Sliwa v. Bright House Networks, LLC*, 2016 WL 3901378 at *3 (M.D. Fla. July 19, 2016). *See also Marshall v. CBE Group, Inc.*, 2018 WL 1567852 at *5 n. 4 (D. Nev. Mar. 30, 2018) (rejecting Plaintiff's argument that *ACA Int'l* was not binding on that court). Indeed, the Ninth Circuit's decision to stay at least one fully-briefed and argued appeal pending the D.C. Circuit's decision, *see Marks v. Crunch San Diego, LLC*, Case No. 14-56834 (9th Cir. Dec. 14, 2016), offers additional support that the decision would have binding effect on the Ninth Circuit Court of Appeals, which is of course binding on this Court.

much" would be required to enable such capacity. *ACA Int'l*, 855 F.3d at 692. If ATDS capacity could be enabled "merely upon touching a button," such fact will preclude summary judgment. *Id.* at 695. However, if more is needed, the 3Seventy Platform will not be considered an autodialer for purposes of the statute. *Id.* at 692. *See also Gragg v. Orange Cab Co. Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014) (rejecting the suggestion that that *Satterfield* stood for the proposition that "a system that has to be reprogrammed or have new software installed in order to perform the functions of an ATDS" would nonetheless be an ATDS under the statute).

To fully understand what exactly amounts to having this "capacity," however, the Court must first determine what functions a device must have to qualify as an ATDS under the statute. The parties here, like many before them, dispute the boundaries of the required functions in subsections (A) and (B) of § 227(a)(1). These issues were also addressed by the *ACA Int'l* court.

1. Capacity "to store or produce telephone numbers using a random or sequential number generator"

GoDaddy first contends that the 3Seventy Platform does not have the capacity to store or produce telephone numbers to be called using a random or sequential number generator, as required by the language of § 227(a)(1)(A). Plaintiff disagrees, contending that the 3Seventy Platform has the capacity to store preprogrammed telephone numbers to be called, which pursuant to FCC interpretative guidelines, is all the statute requires. (Doc. 96 at 9).

Over the past two decades, parties have petitioned the FCC for clarification on what functions are required or omitted from the definition of an ATDS under the TCPA. *See e.g.*, 2003 FCC Order; *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C.R. 559 (2008) ("2008 FCC Order"); *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 15391 (2012) ("2012 FCC Order") (collectively, "FCC ATDS Orders"). One of the issues that has repeatedly been raised is whether a device can qualify as an ATDS even though the device itself

does not have the capacity to generate numbers randomly or sequentially. The FCC's guidance on these queries became increasingly muddled after it determined that "predictive dialers" should be included in the definition of an ATDS. Commonly used by telemarketers, predictive dialers are devices that, among other things, dial numbers from preprogrammed lists as opposed to numbers that are randomly or sequentially generated.[6] In deciding to include predictive dialers in the definition of an ATDS, the FCC noted that

> [T]o exclude from [the restrictions on automated and prerecorded calls] equipment that use [sic] predictive dialing software from the definition of "automated telephone dialing equipment" simply because it relies on a given set of numbers would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages. We believe the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented.

2003 FCC Order at 14092-93.

In 2015, the FCC then seemed to confirm an even more expansive definition of "to store or produce telephone numbers using a random or sequential number generator" that would include devices beyond the limited category of predictive dialers. *ACA Int'l*, 885 F.3d at 702. In its review of the issue, the *ACA Int'l* court noted that the FCC's 2015 Order had again failed to offer meaningful, reasoned guidance as to the meaning of the phrase "using a random or sequential number generator." *Id.* at 701. Specifically, the court noted that the FCC had failed to clarify "whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed" or whether it is "enough if the device can call from a database of telephone numbers generated

[6] As summarized in *Marks v. Crunch San Diego, LLC*: "In most cases, telemarketers [using predictive dialers] program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call. The principal feature of predictive dialing software is a timing function, not number storage or generation. These machines are not conceptually different from dialing machines without the predictive computer program attached." 55 F. Supp. 3d 1288, 1293, n. 7 (S. D. Cal. 2014) (citing 2003 FCC Order at 14092).

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elsewhere[.]" *Id.* The court found the FCC "to be of two minds on the issue." *Id.* On the one hand, said the court, the 2015 Order seemed to clearly distinguish (1) equipment that can randomly or sequentially generate numbers and then dial; from (2) equipment that merely dials from a stored calling list. *Id.* at 702. In doing so, the court observed that the FCC implicitly suggested that a device that did not randomly or sequentially generate numbers and dial would *not* qualify as an ATDS. *Id.* But in other respects, the court found that the 2015 Order also suggested that equipment can meet the statutory definition even if it did not have the ability to generate and dial random or sequential numbers. *Id.* Accordingly, the *ACA Int'l* court asked:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.

Id. at 702-03. Given the lack of clarity on the issue, the court "set aside" the FCC's interpretations of "using a random or sequential number generator." *Id.* at 703.

As a result of the D.C. Circuit's holding on this issue, this Court will not defer to any of the FCC's "pertinent pronouncements" regarding the first required function of an ATDS, i.e., whether a device that has the capacity to store or produce telephone numbers "using a random or sequential number generator." *ACA Int'l*, 885 F.3d at 701 (rejecting FCC's objection that the court lacked jurisdiction to hear a challenge concerning the functions an ATDS must be able to perform on the grounds that the 2015 FCC Order merely reaffirmed prior orders on the issue: "The agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform").

To date, several courts in the Ninth Circuit have adopted the FCC's interpretation that a device may nevertheless meet the autodialer definition even when it only dials from a fixed set of numbers, e.g., when the device itself lacks the capacity to generate random or sequential numbers to be dialed. *See e.g., Luna*, 122 F. Supp. 3d at 940 (finding "fact

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that [defendant's] system has the ability to send text messages from preprogrammed lists, rather than randomly or sequentially, does not disqualify it as an ATDS"); *Glauser*, 2015 WL 475111, at *6 (noting "the capacity for random/sequential dialing is not required for TCPA liability"); *McKenna v. WhisperText*, 2015 WL 428728, at *3 (N.D. Cal. Jan. 20, 2015) (noting the courts in the northern district of California have held that the 2003 FCC order encompasses more than just predictive dialers but also any equipment that stores telephone numbers in a database and dials them without human intervention). But in so finding, these courts were bound and guided by the now-defunct FCC interpretations regarding this function. As such, the Court is also not persuaded to follow these holdings, particularly because the FCC interpretations relied upon by these courts were driven by policy considerations and not the plain language of the statute.

Indeed, in light of the *ACA Int'l* decision, this Court declines to apply such a broad interpretation of this function. Broadening the definition of an ATDS to include any equipment that merely stores or produces telephone numbers in a database would improperly render the limiting phrase "using a random or sequential number generator" superfluous. *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166 (2004) (courts are "loathe" to render a part of a statute superfluous). As noted by the court in *Marks v. Crunch San Diego*, "[i]f the statute meant to only require that an ATDS include any list or database of numbers, it would simply define an ATDS as a system with 'the capacity to store or produce numbers to be called.'" 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014). The statute, as that court also noted, is plainly more limited, and requires that the numbers be stored or produced *using a random or sequential number generator*. *Id.* *See also Satterfield*, 569 F.3d 951 (finding that where the statutory language is "clear and unambiguous," the court's "inquiry begins with the statutory text, and ends there as well"). *See also Cooper Indus., Inc.*, 543 U.S. at 167 (when possible court should follow "settled rule" and "construe a statute to give every word some operative effect").

The 3Seventy Platform used by GoDaddy did not have the ability "to store or produce numbers to be called, using a random or sequential number generator."

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§ 277(a)(1). Numbers that were called could only be inputted into the 3Seventy Platform by a preprogrammed file or list provided by the user; the Platform could not randomly or sequentially generate these numbers by itself. Moreover, although it may be theoretically plausible that the 3Seventy Platform could be reprogrammed to have this capacity, it is undisputed that to enable such capability, a user would have to do much more than simply press a button. *ACA Int'l*, 855 F.3d at 695. Indeed, 3Seventy's CEO testified that, although he was unsure exactly what would have to be done to enable such a capability or how long it would take to do so, such modification could only be done at his directive. (Doc. 81-1 at 34:12-36:1). As such, a user of the 3Seventy Platform, even if armed with the programming knowledge necessary to enable it to generate numbers randomly or sequentially, would not be able to do so without the permission of 3Seventy's CEO. The Court finds this barrier is akin to the auditing system used by the defendant in *Marks*, which banned users from inputting numbers into its system without their customer's consent or a customer's response to a call to action. 55 F. Supp. at 1292. Like the defendant in *Marks*, GoDaddy's "access to the platform [was] limited," here, by 3Seventy's CEO. Accordingly, the 3Seventy Platform lacked the capacity to become a device that could randomly or sequentially generate numbers to be dialed.

2. Capacity to dial numbers without human intervention

But even if the Court were to find that the inability to randomly or sequentially generate telephone numbers did not disqualify the 3Seventy Platform from being an ATDS, its inability to dial numbers without human intervention would.

The FCC has repeatedly confirmed that the defining characteristic of an autodialer is the ability to "dial numbers without human intervention." *ACA Int'l*, 885 F.3d at 703 (referencing the 2015 FCC Order at 7973 ¶¶ 14, 17; the 2008 FCC Order at 566 ¶ 13; and the 2003 Order at 14,092 ¶ 132). The *ACA Int'l* court found that such an interpretation "makes sense given that 'auto' in autodialer – or equivalently, 'automatic' in 'automatic telephone dialing system,' [] – would seem to envision non-manual dialing of telephone numbers." *Id.* (internal citation to statute omitted). Nevertheless, when the FCC was

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asked to confirm in its 2015 Order "that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention," the FCC declined to do so. *Id.* (citing 2015 FCC Order at 7976 ¶ 20). The *ACA Int'l* court found the FCC's rejection of the human intervention test "difficult to square" with its prior pronouncements regarding an autodialer's "basic function." *Id.* It accordingly set aside the FCC's 2015 treatment of the matter. *Id.* (additionally noting that "[t]he order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions").

ACA Int'l's holding on this issue clarifies that this Court is not bound by the FCC's 2015 rejection of the "human intervention" test. Instead, because the FCC's prior interpretations and pronouncements regarding the "basic function" of an autodialer (1) "make[] sense"; (2) are in accordance with the treatment of this issue by courts in the Ninth Circuit; and (3) are otherwise consistent with a reasonable interpretation of the statute, the Court finds that a device will only constitute an ATDS if it can dial numbers (or send text messages) "without human intervention." *Id.*

What constitutes the amount of "human intervention" required to take a device out of the category of an autodialer is a mixed question of fact and law. *See* 2015 FCC Order at 7973 ¶ 17 ("How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination"). Here, material facts related to how the 3Seventy Platform operated in sending the text to Plaintiff are undisputed. The parties disagree as to whether these undisputed facts amount to "human intervention" such that the 3Seventy Platform falls outside the TCPA's restrictive purview.[7]

. . . .

[7] Indeed, Plaintiff "denies in part" GoDaddy's statements of fact in paragraphs 8-13 on the grounds that these actions have nothing "to do with what it takes to 'send a text message.'" *See* Pl. SCOF ¶¶ 8-13. These are not factual disputes, however, but disputes as to the proper application of the law to those otherwise undisputed facts.

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GoDaddy has identified multiple stages in the process of sending Plaintiff the text message in which human intervention was involved. First, an employee of GoDaddy provided 3Seventy with a list of customer phone numbers via its FTP site, which 3Seventy then uploaded to the Platform. (Def. SOF ¶ 7; Pl. CSOF ¶ 7). The employee then navigated to the website, logged onto 3Seventy's Platform, and selected the customer numbers it wished to send the text message. (Def. SOF ¶¶ 8, 9; Pl. CSOF ¶¶ 8, 9). The employee then drafted the message and selected a time and date to send the message. (Def. SOF ¶¶ 10-11; Pl. CSOF ¶¶ 10-11). Finally, the employee entered a "captcha" – a device designed to ensure that a human, not a robot, was authorizing the desired message. (Def. SOF ¶ 12; Pl. CSOF ¶ 12). Only after the employee entered the captcha was the 3Seventy Platform able to send the message. (Zecchini Decl., Ex. 1, Doc. 81-1 at 109:5-13; 111).

In *Luna v. Shac, LLC*, the Northern District of California found similar types of human intervention precluded a system from being defined as an ATDS. The facts in *Luna* are nearly indistinguishable from the facts here. In *Luna*, like here, defendant had engaged a third-party mobile marketing company to provide defendant with a web-based platform so that it could send promotional text messages to its customers. 122 F. Supp. 3d at 937. To send texts through that platform, an employee would similarly (1) input the numbers, either by typing them into the website or uploading them from an existing list of numbers; (2) log onto the platform to draft the message content; (3) designate the specific phone numbers to receive the message; and (4) click "send" on the website to transmit the message, which could be done either in real time or calendared to send at some future date. *Id.* The court there found that "human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, and was not limited to the act of uploading the telephone numbers to the [platform's] database, as Plaintiff argues." *Id.* at 941. Specifically, the court found that "human intervention was involved in drafting the message, determining the timing of the message, and clicking 'send' on the website to transmit the message to Plaintiff." *Id.* The court held that

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because the "text message was sent as a result of human intervention," the platform in question was not an ATDS and summary judgment in favor of the defendant was warranted. *Id.*

Other California district courts have also reached the same conclusion under similar facts. *See McKenna*, 2015 WL 428728, at * 3-4 (dismissing complaint under TCPA where allegations clearly stated that device could send text messages "only at the user's affirmative direction to recipients selected by the user"); *Glauser*, 2015 WL 475111, at *6 (granting summary judgment on TCPA claim where text messages were sent to plaintiff "as a direct response to the intervention" of the group's creator, where creator had obtained numbers and uploaded them to the database). *See also Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1194 (W.D. Wash. 2014) (finding human intervention to send texts was "essential" to system's ability to dial and transmit the messages and as such system in question was not an ATDS).

Plaintiff says these cases are not persuasive because "they ignore and do not acknowledge the FCC's 2015 Order and its rejection of a *per se* 'human intervention' test." (Doc. 96 at 17). As explained, however, the FCC's rejection of this test has been set aside and is not binding on this Court. As such, Plaintiff's argument that that these stages of human intervention have "nothing to do with sending a text message" (Pl. CSOF ¶ 13) is unpersuasive. Moreover, the non-binding cases cited by Plaintiff in support of its argument are distinguishable and/or no longer good law in light of *ACA Int'l*. *See Keim v. ADF Midatlantic, LLC*, 2015 WL 11713593, at *6 (S.D. Fla. 2015) (finding FCC 2015 Order rejecting human intervention test precluded defendant's argument that system was not at ATDS because text could only be sent by human intervention); *Sterk v. Path, Inc.*, 46 F. Supp. 3d 813 (N.D. Ill. 2014) (finding system in question was an ATDS where the only human intervention identified prior to sending the text was the "collection of numbers for [the system's] database of numbers"); *Johnson v. Yahoo!, Inc.*, 2014 WL 7005102, at *5 (N.D. Ill. Dec. 11, 2014) (noting although it was "clear" that defendant's personalized message involved human intervention, issues of fact

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remained as to whether system could also "'automatically' (i.e., without human intervention)" send a system message).

The Court finds that the "level of human agency involved in transmitting the text" amounts to essential human intervention that precludes defining the 3Seventy Platform as an ATDS. *Gragg*, 995 F. Supp. 2d at 1194. Like the defendant in *Luna*, the alleged human intervention is not limited to GoDaddy's collection and transmission of numbers to 3Seventy. GoDaddy also had to then log into the system, create a message, schedule a time to send it, and perhaps most importantly, enter a code to authorize its ultimate transmission. As such, the text was not sent automatically or without human intervention and thus was not sent using an autodialer, as that term is defined under the TCPA. Because Plaintiff cannot establish an essential element of his TCPA claim, GoDaddy's motion for summary judgment is granted.

3. GoDaddy's Motion to Exclude Plaintiff's Expert Report

As noted above, material facts related to the operation of the 3Seventy Platform were undisputed. The parties instead disputed (1) the governing law; and (2) the application of the governing law to those undisputed facts. On a motion for summary judgment, expert opinions are relevant if they help determine the existence of a dispute of material fact. *See Celotex,* 477 U.S. at 324. Here, Plaintiff's expert has offered only conclusions of law with regard to the issues presented in the motion. Accordingly, the Court did not take his opinions into account in granting GoDaddy's motion. GoDaddy's motion to exclude this expert is therefore denied as moot.

For the foregoing reasons,

IT IS ORDERED granting GoDaddy's Motion for Summary Judgment (Doc. 79). GoDaddy's Motion to Stay, in the Alternative (Doc. 79), is **denied**.

IT IS FURTHER ORDERED denying Plaintiff's Motion to Strike Defendant GoDaddy.com LLC's Fourth Affirmative Defense of Consent as Legally Deficient (Doc. 74) and GoDaddy's Motion to Exclude the Expert Report and Opinion of Jeffrey A. Hansen (Doc. 83) **as moot**.

IT IS FINALLY ORDERED dismissing with prejudice this matter in its entirety. The Clerk of Court is respectfully directed to enter judgment accordingly and terminate this case.

Dated this 14th day of May, 2018.

Honorable Diane J. Humetewa
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANDRA WEST and HECTOR MEMBRENO, individually and on behalf of all others similarly situated, Plaintiffs, vs. CALIFORNIA SERVICE BUREAU, INC., Defendant.	Case no. 4:16-cv-03124-YGR **CLASS ACTION** **NOTICE OF MOTION AND MOTION IN LIMINE NO. 1 TO EXCLUDE TESTIMONY OF JEFF HANSEN** Pretrial Conference Date: April 16, 2018 Time: 9:30 a.m. Courtroom: 1 Judge: Hon. Yvonne Gonzalez Rogers

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant California Service Bureau, Inc. ("CSB") will and hereby does move this Court for an Order excluding at trial any opinion-testimony by Jeffrey Hansen about the reliability of reverse-look-up procedures, as lacking foundation and inadmissible speculation.

This motion is also made to exclude Mr. Hansen's testimony that the Global Connect system utilizes a Windows operating system, that Windows has the capacity to produce a list of sequential telephone numbers if an operator inputs certain specific commands to Windows, and to exclude his opinion that the Global Connect system therefore has the capacity to dial a list of telephone numbers which is generated by such commands to Windows. His opinion that the Global Connect system has the capacity to dial such a list, without further coding and programming of the Global Connect system, lacks foundation, and it is irrelevant.

This Motion in Limine is based on this Notice of Motion and Motion, the accompanying Memorandum and Declaration of Darrin Bird, the records which have been filed in this case, the arguments of counsel, and such further information which may be properly presented at the hearing on this motion.

Dated: April 2, 2018 **CARLSON & MESSER LLP**

By: /s/ Charles R. Messer
Charles R. Messer
David J. Kaminski
Stephen A. Watkins
Attorneys for Defendant,
CALIFORNIA SERVICE BUREAU, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Pursuant to this Court's June 13, 2017 Order (ECF 39), Plaintiffs' expert reports were due on July 19, 2017 and rebuttal reports by August 23, 2017. On July 19, 2017, Plaintiffs served the expert report of Jeffrey Hansen. They did not disclose expert Ana Verkhovskaya.

This Court relied upon the testimony of Plaintiffs' experts Jeff Hansen and Ana Verkhovskaya in granting class certification:

> "Defendant takes issue with the accuracy of reverse lookup services given the high rate of cell phone turnover amongst recipients of debt collection calls. ***However, this criticism fails in light of the fact that plaintiffs' expert opined that the reverse lookup service would be used to identify the users of each phone number "at the time of the calls"*** and testified to the same during his deposition. (Hanson Rpt. ¶ 56; Hanson Dep. at 41:21-25; see also Verkhovskaya Rpt. ¶¶ 14-15.) Therefore, plaintiffs' proposed methodology controls for cell phone turnover by comparing defendant's records to the reverse lookup service data at a specific point in time."

December 11, 2017 Order at 7:25-28 (emphasis added).

As shown below, the opinion testimony of Mr. Hansen should be excluded.

A. The opinion testimony of Jeffrey Hansen should be excluded as it is wholly speculative and irrelevant

Mr. Hansen's opinion testimony should be excluded because he never analyzed the call data to identify class members via reverse lookup methodology. *See Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-6314-YGR, 2017 WL 1806583, at *5 (N.D. Cal. May 5, 2017), *amended sub nom*, No. 15-CV-06314-YGR, 2018 WL 558844 (N.D. Cal. Jan. 25, 2018). In *Abante*, this Court struck Mr. Hansen's expert report on the grounds that it was speculative, as he never actually analyzed the data. *Id. See also Southwell v. Mortg. Inv'rs Corp. of Ohio*, No. C13-1289 MJP, 2014 WL 3956699, at *4 (W.D. Wash. Aug. 12, 2014) (striking Ms. Verkhovskaya's declaration on the grounds it was "entirely prospective; i.e., it simply describes what she intended to do with the data provided by Plaintiffs"). When as here, an expert fails to perform any analysis or provide any opinion, but merely states that such an

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analysis could be performed or such opinion could be provided, without any supporting data, the testimony is properly stricken as irrelevant. *In re Conagra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014).

As Mr. Hansen's testimony is wholly irrelevant, it should be excluded at trial.

B. The opinion testimony of Jeffrey Hansen should be excluded as it is prejudicial

CSB was prejudiced as (1) CSB could not have anticipated the need to designate a rebuttal expert for Hansen's clearly speculative testimony regarding reverse lookup and (2) Hansen's speculative methodology was one of the reasons the Court permitted Ms. Verkhovskaya's untimely expert disclosure. Mr. Hansen's prejudicial testimony should be excluded.

C. Jeffrey Hansen's opinion that the Global Connect telephone system is an Automatic Telephone Dialing System lacks foundation and should be excluded.

The FCC's 2003, 2008 and 2015 rules which expanded the definition of an Automatic Telephone Dialing System ("ATDS") to include predictive dialers were vacated two weeks ago in *ACA International v. Federal Communications Commission,* 2018 WL 1352922 (D.C. Cir. 2018). Because those rules were vacated, an ATDS is defined in the statute:

> An Automatic Telephone Dialing System is equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.

47 U.S.C. section 227(a)(1); *Satterfield v. Simon & Schuster, Inc.,* 569 F. 3d 946, 951 (9th Cir. 2009).

This motion is directed at Mr. Hansen's potential testimony that the Global Connect system utilizes a Windows operating system, that Windows has the capacity to produce a list of sequential telephone numbers if an operator inputs certain specific commands, and that the Global Connect system has the capacity to dial a list of telephone numbers which is generated by such commands to Windows.

The Declaration of Global Connect's Darrin Bird, attached hereto as Exhibit A, establishes that contrary to Mr. Hansen's opinion, the Global Connect system is incapable of dialing a list of telephone numbers which is generated by Windows, without adding computer coding which would transfer those numbers from Windows into the Global Connect system. Mr. Hansen's opinion lacks foundation and should be inadmissible for that reason. Rules 703 and 901, *Federal Rules of Evidence*.

The defendant also contends that Mr. Hansen's opinion is insufficient to prove that an ATDS was used, as a matter of law. For that reason, his opinion is inadmissible because it is irrelevant. One of the court's concerns in *ACA International* was that the FCC's broad ATDS-rules swept up devices like smartphones, and the court thought it implausible that Congress intended to make most Americans who use smartphones into potential TCPA-violators. Mr. Hansen's new Windows theory suffers from the analytical deficiency as the FCC's old rules, in that under his theory, users of Windows-based smartphones, or users of Windows-based-computers which are used to make telephone calls over the Internet, will become potential TCPA-violators. It is implausible for Congress to have intended such a result.

Pursuant to Rules 402, 403, 703 and 901 of the *Federal Rules of Evidence*, the defendant respectfully submits that Jeffrey Hansen's general opinions about the reliability of reverse-look-up procedures, and his specific opinion that he knows how to command Windows to produce sequential telephone numbers (and that therefore any telephone system which utilizes Windows must be an ATDS), should be excluded from evidence.

D. Defendant's Motion in Limine was delayed due to the change in the law

The Court had previously set an April 4, 2018 Pretrial Conference. Defendant exchanged Motions in *Limine* with Plaintiff on March 7, 2018, as required, including this Motion. Defendant's Motions in *Limine* were originally due to be filed by March 16, 2018 with the Pretrial Conference Statement. On March 16, 2018, the D.C. Circuit issued its opinion in *ACA International v. Federal Communications Commission*, 2018 WL 1352922 (D.C. Cir. 2018). On March 20, 2018, Order, Dkt No. 84, this Court requested that the parties submit briefing regarding the impact of *ACA International*. One such impact was that Defendant's Motion in

Limine was delayed to account for the change in the law. The current Pretrial Conference date is set for April 16, 2018. Plaintiff's Opposition is due by April 6, 2018, pursuant to the Court's Standing Order re Pretrial Instructions.

Defendant met and conferred with Plaintiff regarding these issues, and on March 31, 2018, Defendant was prepared to file his Motion in *Limine*. Defendant forwarded Plaintiffs' counsel a draft of this Motion at that time. Plaintiffs' counsel informed Defendant that it would not challenge Defendant's Motion as untimely and stated both sides could file their Motions in *Limine* on April 2, 2018. On April 2, 2018, Plaintiffs' counsel changed course and stated Plaintiffs would now oppose Defendant's Motion in *Limine* on the grounds it is untimely.

Defendant could not have anticipated a change in the law regarding the primary issue in this case on the day its Motion in *Limine* was due. *See also United States v. Mulder*, 889 F.2d 239, 240 (9th Cir.1989) (change in law constituted good cause to consider late argument). The briefing filed on March 20, 2018 previewed the very arguments made in this Motion in *Limine*. Defendant asserts Plaintiff is therefore not prejudiced by any delay in filing this Motion in *Limine*, and that pursuant to *Mulder*, Defendant's motion should be heard, given the change in law.

Dated: April 2, 2018

CARLSON & MESSER LLP

By: /s/ Charles R. Messer
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Exhibit (A)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANDRA WEST and HECTOR MEMBRENO, individually and on behalf of all others similarly situated, Plaintiffs, vs. CALIFORNIA SERVICE BUREAU, INC., Defendant.	Case no. 4:16-cv-03124-YGR CLASS ACTION **DECLARATION OF DARRIN BIRD IN SUPPORT OF MOTION IN LIMINE RE JEFF HANSEN** Date: April 16, 2018 Time: 9:30 a.m. Courtroom: 1 Hon. Yvonne Gonzalez Rogers

I, Darrin Bird, declare as follows:

1. I am over the age of eighteen years and am competent to make this declaration.

2. I have personal knowledge of the matters set forth in this declaration, except as to those matters stated upon information and belief, and I believe those matters to be true.

3. I am Chief Operating Officer and Executive Vice President of Global Connect, LLC. Global Connect, LLC designs and manufactures computerized telephone dialing systems. Global Connect also supplies telephone- and dialing-services to other companies, including (but not limited to) defendant California Service Bureau, Inc.

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4. I have read and reviewed the July 19, 2017 Written Report of Jeffrey A. Hansen from the case *Sandra West et al v. California Service Bureau, Inc.*, case no. 4:16-cv-03124-YGR.

5. In the ordinary course of its business, defendant California Service Bureau, Inc. used a Global Connect Peak telephone dialing system. That Global Connect Peak system is and was, at all times, exclusively controlled, maintained and operated by Global Connect, LLC, pursuant to a Contract between Global Connect, LLC and California Service Bureau, Inc.

6. Mr. Hansen's statements that the Global Connect Peak dialing system, which was utilized by defendant California Service Bureau, Inc., "has the capacity to store or produce numbers to be called, using a random or sequential number generator, and the capacity to call such numbers," (Para. 25) are untrue.

7. The computer-code of the Global Connect Peak system was custom-written by employees of Global Connect, LLC. That computer-code, constituting the architecture of the Global Connect Peak system, was designed, developed and maintained without the capacity to produce telephone numbers by using a random or sequential number generator. By design, the Global Connect Peak system lacks the capacity, past or present, to produce numbers by using a random or sequential number generator. Mr. Hansen's statement that the Global Connect system has the capacity to produce telephone numbers by using a random or sequential number generator is baseless and patently false.

8. Also, the computer-code of the Global Connect Peak system was designed, developed and maintained with no capacity to store telephone numbers created by using a random or sequential number generator. Mr. Hansen's conclusion that the Global Connect system has the capacity to store telephone numbers created by using a random or sequential number generator is simply incorrect.

9. Further, the computer-code of the Global Connect Peak system was designed, developed and maintained without any capacity to dial telephone numbers which are randomly or sequentially generated by the Global Connect Peak system. Mr. Hansen's statement that the

Global Connect system had the capacity to call or dial telephone numbers which are randomly or sequentially generated by the Global Connect Peak system is baseless and untrue.

10. Mr. Hansen's statement that the Global Connect system, "has the capacity to generate numbers to form a list for dialing without human intervention" (Para. 26) is baseless and untrue. Contrary to Mr. Hansen's claim, the computer-code of the Global Connect Peak system was specifically designed, developed and maintained to have no capacity to generate telephone numbers which can be dialed, without human intervention.

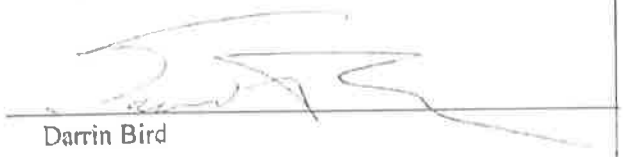
11. None of the Global Connect documents which Mr. Hansen claims to have reviewed (Exhibits T, U, V, W, X, Y, Z, AA, AB, AC, and AD which are listed in paragraphs 13 and 24 of Mr. Hansen's report) support his opinions that the Global Connect Peak system which was used by defendant California Service Bureau, Inc. had any of the capacities which he claims, and which are discussed herein.

12. Mr. Hansen states that users of the Global Connect Peak system can use Microsoft Windows or Linux to operate the system (Hansen report at para. 38). He also claims that, "All computers can generate random or sequential numbers" (Hansen report at para. 36). Even if all computers can generate random or sequential numbers, those computers must be specifically programmed to generate random or sequential 10-digit telephone numbers. The computer-code of the Global Connect Peak system was designed, developed and maintained without the ability or capacity to generate 10-digit telephone numbers by using a random or sequential number generator. Further, the Global Connect system which was used by defendant California Service Bureau, Inc. could not automatically dial a list of telephone numbers which was generated by Windows or by Linux, unless the system was modified by new computer-coding and/or re-programming. No such modifications of the Global Connect system have ever been contemplated, designed, or implemented. Further, if Mr. Hansen's theory is accepted, then every Skype (Google) smartphone, and every home computer which uses Windows or Linux and which is used to make telephone calls over the Internet, will fall within his definition of an ATDS.

I declare under penalty of perjury under the laws of the United States of America and the

State of California that the foregoing is true and correct.

Executed on March 30, 2018 at St. George, Utah.



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANDRA WEST and HECTOR MEMBRENO, individually and on behalf of all other similarly situated, Plaintiffs, vs. CALIFORNIA SERVICE BUREAU, INC. Defendant.	Case No. 4:16-cv-03124-YGR **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 1** Date: April 16, 2018 Time: 9:30 a.m. Courtroom: 1 Judge: Hon. Yvonne Gonzalez Rogers

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I. CSB'S MIL REGARDING MR. HANSEN'S TESTIMONY SHOULD BE DENIED

Defendant asks the Court to exclude Plaintiffs' expert Jeffery Hansen because his testimony is "wholly speculative," lacks foundation, and Defendant is prejudiced by its own decision to not designate a rebuttal expert. *See* generally Defendant's Motion in Limine to Exclude Jeff Hansen ("Hansen MIL") (ECF No. 90). As detailed below, Defendant's criticisms are without merit.

A. Defendant's Failure to Bring a *Daubert* Motion Constitutes a Waiver of the Instant Objections

First, Defendant waived its arguments as to the admissibility and reliability of Mr. Hansen's testimony due to its failure to file a timely *Daubert* motion by the September 26, 2017, deadline set by the Court. ECF No. 27.[1] This constitutes a waiver of objections to the reliability of his expert testimony, which cannot be sidestepped by using a motion *in limine*. *Gonzalez v. Cont'l Tire N. Am., Inc.*, 2005 WL 5978045, at *5 (D. Ariz. Aug. 24, 2005) ("With respect to CTNA's motion in limine regarding Alan Milner, the Court holds that CTNA waived their right to objection because they did not do so at the Daubert hearing held before Judge Marshall."); *Malibu Media, LLC v. Weaver*, 2016 WL 7666168, at *2 (M.D. Fla. Feb. 6, 2016) ("The deadline for filing Daubert motions has already passed"); *DS Waters of Am., Inc. v. Fontis Water, Inc.*, 2012 WL 12875685, at *2 (N.D. Ga. Dec. 31, 2012) (same).

B. Mr. Hansen's Testimony is Neither Speculative Nor Prejudicial.

Defendant contends that the opinion testimony of Jeffrey Hansen should be excluded as is it wholly speculative," and prejudicial. Hansen MIL at 1-2. When certifying the instant class, the Court rejected Defendant's same criticisms of Mr. Hansen's testimony:

> [P]laintiffs' TCPA expert Jeffrey Hansen submitted a timely expert declaration which described the methodology and tasks which could be used to identify class members in this case. Defendant took Mr. Hansen's deposition and examined him regarding this methodology. Ms. Verkhovskaya then implemented the exact same methodology set forth in Mr. Hansen's report …

[1] Defendant's position that the "Motion in Limine was delayed due to a change in the law[,]" is completely beside the point. Hansen MIL at 3. Plaintiffs' take no issue with the April 2, 2016, filing of motions *in limine* generally. Indeed, per agreement between the parties, Plaintiffs filed their motion *in limine* on the same day. ECF No. 92. Rather, Plaintiffs' timeliness argument is limited solely to the fact that Defendant's objections raised against Mr. Hansen should have been brought in a *Daubert* motion in advance of the September 26, 2017 deadline. ECF No. 27.

> [I]t cannot be said that defendant 'reasonably surmise[d] that Plaintiffs chose not to proceed on' a numerosity theory based on the methodology described by Mr. Hansen and employed Ms. Verkhovskaya.

Order Granting Plaintiffs' Motion for Class Certification (ECF No. 68), 10 fn.11. Indeed, Mr. Hansen's methodology cannot be speculative because it was tabulated by Ms. Verkhovskaya.

Instead of identifying what about Mr. Hansen's testimony is improper, Defendant falls back to its claim of prejudice. Hansen MIL, at 2. But Mr. Hansen's testimony has not changed. Defendant's failure to not designate an expert is not a result of prejudice, it is just a bad decision.

C. ACA International Does Not Deprive Mr. Hansen's Expert Opinion of its Foundation

Defendant argues that Mr. Hansen's testimony regarding the Global Connect system "lacks foundation and should be inadmissible." Hansen MIL at 3 (citing Fed. R. Evid. 703 and 901). Defendant bases this position on (1) a strained interpretation of *ACA International v. Federal Communications Commission,* 2018 WL 1352922 (D.C. Cir. 2018) ("*ACA*") and (2) the testimony of Darren Bird. Defendant's arguments are without merit and improper.

As an initial matter, contrary to Defendant's representation that *ACA* vacated "the FCC's 2003, 2008 and 2015 rules" the only matter before the D.C. Circuit in *ACA* was a Hobbs Act appeal from certain portions of the 2015 FCC Order. Hansen MIL at 2. In a Hobbs Act appeal, the court has authority "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final FCC orders. 28 U.S.C. § 2342. The Hobbs Act does not give the court jurisdiction to do more than this. Indeed, the ACA court expressly limited its analysis to "review of [the] 2015 order[.]" *ACA International,* 2018 WL 1352922 at *1 and *9 ("Applying [the APA's] standards to petitioners' four sets of challenges *to the Commission's 2015 Declaratory Ruling* …") (emphasis added). Accordingly, *ACA* is best viewed as rolling the clock back to 2014, before the FCC had issued the portions of its 2015 order that relate to the definition of an Automatic Telephone Dialing System ("ATDS"). The Court should interpret the TCPA in light of the 2003 and 2008 FCC orders and the decisions based thereon.

Ninth Circuit decisions remain binding precedent for this Court for at least two questions regarding the definition of ATDS. First, *Satterfield v. Simon & Schuster, Inc.*, requires courts to

give meaning to the term "capacity" in the ATDS definition. 569 F.3d 946 (9th Cir. 2009). There, the district court erred by focusing on whether the dialer actually stored, produced, or called numbers using a random or sequential number generator, rather than its capacity to do so. *Id.* at 950-51. Second, *Meyer v. Portfolio Recovery Assocs., LLC*, decided three years before the FCC's 2015 order, adopts the view that "capacity" is not limited to present ability. 707 F.3d 1036, 1043 (9th Cir. 2012) (determining defendant's system was an ATDS based upon its capacity, and not "the present capacity"). Thus, Mr. Hansen's testimony that the Global Connect system has the capacity to dial a list of telephone numbers remains relevant and helpful to the finder of fact in making the factual determination that the Global Connect dialer is an ATDS. Additional explanation as to why the *ACA* decision did not invalidate Mr. Hansen's testimony was also included in Plaintiffs' 3/26/18 *ACA Int'l* Brief § II (ECF No. 87).

Even without the 2003 and 2008 FCC Orders and Ninth Circuit authority, any device that stores and dials numbers without human intervention is an ATDS. 47 U.S.C. § 227(a)(1). The statute only requires an ATDS to "store *or* produce telephone numbers[.]" *Id.* (emphasis added). *See Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 373 n.1 (3d Cir. 2015). Traditional canons of statutory construction support a reading of the statute that treats "storage" of telephone numbers separately from "production" of those numbers. The Last Antecedent Rule says that a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Applying this rule to § 226(a)(1)(A), the phrase "using a random or sequential number generator" modifies the word "produce" rather than the word "store." Moreover, the position that an ATDS must store numbers using a number generator is nonsensical, as number generators by definition *produce* numbers, not *store* them. There is no such thing as a number "generator" that stores numbers.

Defendant's attempt to analogize Mr. Hansen's testimony regarding the Global Connect system to smartphones does not persuade. Hansen MIL at 3. The TCPA requires that an ATDS "store or produce telephone numbers to be called ... and ... ***dial such numbers***." 47 U.S.C. 227(a)(1) (emphasis added). With the 2015 FCC Order vacated, the more reasonable textual

reading of the TCPA is that, to be an ATDS, a device must be able to "dial such numbers" without human intervention. *See Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 n. 2 (N.D. Ill. 2011) ("CPS's collectors do not dial the numbers, the dialer does. This is 'automatic dialing' under any reasonable interpretation of that phrase."). Here, CSB's Global Connect dialer unquestionably dials numbers from stored lists without human intervention. *See* PTCS § II.A, ¶ 9.

Finally, Defendant contends that the Declaration of Darren Bird conclusively establishes that Mr. Hansen's opinion is factually wrong. Hansen MIL at 3. However, the fact that Mr. Bird may disagree with Mr. Hansen does not prove him wrong, but rather at most shows a factual dispute ripe for jury determination. "*Daubert* does not allow a court to resolve a factual dispute underlying the expert's analysis. A trial court is not permitted under *Daubert* to transform a *Daubert* hearing into a trial on the merits." *IGT v. Alliance Gaming Corp.*, 2008 WL 7084605, at *8 (D. Nev. Oct. 21, 2008). Similarly, "[a] motion *in limine* should not be used to resolve factual disputes or weigh evidence." *Id.* at *2.[2] Second, Mr. Bird's declaration is improper because it is a series of legal conclusions. *See Torres v. City of Los Angeles*, 548 F.3d 1197, 1214 n.11 (9th Cir. 2008) (holding district court abused its discretion when it allowed expert to offer legal conclusion on existence of probable cause); *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990) ("A witness is not permitted to give a direct opinion about the defendant's guilt or innocence."). Further, Mr. Bird's contention that Global Connect's dialer "lacks capacity, past or *present*," is both a factually disputed issue and legally irrelevant. *See Meyer*, 707 F.3d at 1043 (finding that the dialers at issue were ATDS pursuant to the "*clear language of the TCPA*" even though the defendant argued that its dialers "do not have the *present* capacity") (emphasis added). Similarly, Mr. Bird's statement that Global Connect was designed "with no capacity to store telephone numbers created by using a random or sequential number generator" is nonsensical as he essentially admits that the dialer is, in fact, capable of storing numbers.

[2] Indeed, as the Court's standing order provides "[e]ach motion may not exceed more than four (4) pages." Standing Order Re: Pretrial Instructions 4(a). Defendant circumvented this order with its inclusion of a three page declaration to argue facts and parrot conclusions of law.

Dated: April 6, 2018

Respectfully submitted,

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